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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. 32.

MILWAUKEE COUNTY,

vs.

M. E. WHITE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE, M. E. WHITE COMPANY.

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BRIEF OF APPELLEE, M. E. WHITE COMPANY.

Preliminary Statement.

This case comes on for hearing in this court on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

Question Certified.

The question certified to this court by the United States Circuit Court of Appeals for the Seventh Circuit is:

Should a United States District Court in and for the State of Illinois, having jurisdiction of the parties, enter-

tain jurisdiction of an action therein brought, based upon a valid judgment for over $3,000 rendered by a court of competent jurisdiction in the State of Wisconsin against the same defendant, which judgment was predicated upon an income tax due from the defendant to the State of Wisconsin? (Certif. 2.)

Statement of Facts.

The relevant facts in this controversy as stated by the United States Circuit Court of Appeals for the Seventh Circuit (Certif., 1-2) is sufficiently accurate and comprehensive except, appellee respectfully submits to this court, in one particular; namely, the statement omits all reference to the fact that from the face of the judgment upon which this action is brought it appears that there is included a penalty (Certif., 10) and that this penalty is imposed by the State of Wisconsin in addition to interest for a violation of its revenue laws (Certif., 9).

Propositions of Law.

The question certified to this court by the United States Circuit Court of Appeals for the Seventh Circuit should be answered in the negative because:

I. The District Court of the United States is without jurisdiction to entertain an action for the extrastate enforcement of the revenue laws of one of the States of the United States.

II. Article IV, Section 1, of the Constitution of the United States, and the Act of May 26, 1790, Chap. 11 (28 U. S. C. A. Sec. 687) do not compel the courts within the United States to entertain jurisdiction of an action for the

extrastate enforcement, either directly or indirectly, of the revenue laws of one of the States of the United States.

Summary of Argument.

The enforcement of the revenue laws of another State, like foreign political and penal laws, is not properly cognizable by or within the power of the judiciary of the United States or any State of the United States, unless and until and only to the extent that such power is specifically granted to the judiciary by the respective sovereignties. Moreover, an action to enforce the revenue claims, whether in judgment or not, of a State of the United States, is not an action of a "civil nature" and hence not within the jurisdiction of District Courts of the United States, particularly where penalties for violation of the revenue laws are a part of the recovery sought. And, finally, the mandatory force of the "full faith and credit" clause of the Constitution of the United States is inoperative where, as in the extrastate enforcement of revenue claims, the competency of courts and not the comity to be extended to foreign created rights is primarily in question.

ARGUMENT.

I.

The District Court of the United States is without jurisdiction to entertain an action for the extrastate enforcement of the revenue laws of one of the States of the United States.

A. A general grant of judicial power confers on a court no power or authority to entertain jurisdiction of an action to enforce, either directly or indirectly, the revenue laws of another State.

1. The authority conferred by a general grant of judicial power is limited to those controversies which, under the settled rules of public and international law, are proper subjects of judicial cognizance.

Article III of Section 1 of the Constitution of the United States vests "the judicial power of the United States * * * in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

In discussing the extent of the judicial powers so granted and the principles applicable in determining that extent, Mr. Justice Bradley, in *Hans* v. *State of Louisiana* (1889), 134 U. S. 1, 16, 33 L. ed. 842, 847, 10 S. Ct. 504, says:

> "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. * * * The establishment of this new branch

> of jurisdiction seems to be necessary from the extinguishment of diplomatic relations between the States. *Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction.*" (Italics ours.)

More concisely, but to the same effect, Mr. Justice Gray, in *Wisconsin* v. *Pelican Insurance Co.* (1887), 127 U. S. 265, 268, 32 L. ed. 239, 243, 8 S. Ct. 1370, said:

> "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit, or prosecution by the one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

Similarly, Mr. Justice Stone, speaking for the Supreme Court of the State of Illinois in *The People* v. *Callopy* (1934), 358 Ill. 11, 14, 192 N. E. 634, 635-636, in reference to the extent of the judicial power granted to the courts of the State of Illinois by that State's Constitution, said:

> "Judicial power is vested in the Supreme Court and other Courts of this State, but what constitutes judicial power is not defined nor limited by the Constitution. It must be said, therefore, that, so far as the provisions or limitations of the Constitution are concerned, there is vested in this Court all power judicial in its nature. In order to ascertain what is meant by judicial power as vested in the Courts of this State by the Constitution, recourse must be had to the history of our institutions prior to and at the time of the adoption of the Constitution, and to the common law as it existed in this country at that time."

These fundamental principles are so conclusively established, and so in accord with reason, that further citation of authorities would serve no useful purpose in establish-

ing the proposition that as between a State and citizens of another State, the judicial power of courts within the United States does not extend beyond controversies which, under the settled principles of public and international law as existing at the time of the grant of such judicial power, are proper subjects of judicial cognizance. Many of the other authorities hereinafter cited will enunciate and reiterate these same principles.

2. An action to enforce, either directly or indirectly, the revenue laws of another State, presents no controversy which, under the settled principles of public and international law, is a proper subject of judicial cognizance.

Under the settled principles of public and international law, the courts of one State *have no jurisdiction* of an action to enforce, either directly or indirectly, that other state's:

(a) political laws:

Cherokee Nation v. *Georgia* (1831), 5 Pet. 1, 75, 8 L. ed. 25, 75.

Georgia v. *Stanton* (1867), 6 Wall. 50, 77, 18 L. ed. 721, 725.

Kentucky v. *Dennison* (1860), 24 How. 66, 108-109, 16 L. ed. 717, 729-730.

Dicey's Conflict of Laws, 5th ed. p. 212.

(b) penal laws:

Wisconsin v. *Pelican Ins. Co.* (1888), 127 U. S. 265; 32 L. ed. 239; 8 S. Ct. 1370.

Oklahoma v. *Gulf Col. & Santa Fe Ry. Co.* (1910), 220 U. S. 290; 55 L. ed. 469, 31 S. Ct. 437.

Huntington v. *Attrill* (1892), 146 U. S. 657; 36 L. ed. 1123; 13 S. Ct. 224.

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Beale (1935), The Conflict of Laws, Sec. 443.1.

American Law Institute (1934), Restatement of the Law of Conflict of Laws, Sec. 611.

Dicey's Conflict of Laws, 5th ed. p. 212.

Story's Conflict of Laws (1834), Sec. 620 at p. 516.

(c) revenue laws:

In re Visser v. *Drukker* (Eng., 1929), 1 Ch. 877.

Municipal Council of Sidney v. *Bull* (Eng., 1909), 1 K. B. 7.

Moore v. *Mitchell* (C. C. A. 2d., 1929); 30 Fed. 2d. 600; 65 A. L. R. 1352; Aff'd on another ground, 1929, 281 U. S. 18, 74 L. ed. 674, 50 S. Ct. 175.

State of Colorado v. *Harbeck* (1921), 232 N. Y. 71, 133 N. E. 357.

Arkansas v. *Bowen* (1894), 3 App. Cases, D. C. 537, Aff'g 20 D. C. Reps. 291.

State of Maryland v. *Turner* (1911), 132 N. Y. Supp. 173.

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And see:

Henry v. *Sargent* (1843), 13 N. H. 321 (41), 332.

Kentucky v. *Dennison* (1860), 24 How. 66, 108-109, 16 L. ed. 717, 729-730.

New York Trust Co. v. *Island Oil & Transport Corp.* (1926), 11 Fed. 2d. 698.

Gibb, International Law of Jurisdiction (1926), p. 253.

Beale (1935), The Conflict of Laws, Secs. 610.1, 610.2 and 443.1.

American Law Institute (1934), Restatement of the Law of Conflict of Laws, Sec. 610.c.
Story's Conflict of Laws (1834), Sec. 257, at p. 220.
Dicey's Conflict of Laws, 5th ed., p. 212.

In Dicey's Conflict of Laws, 5th ed., these settled principles of public and international law are crystallized by that author into a rule, as stated at page 212:

"Rule 54. *The Court has no jurisdiction* to entertain an action—

(1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign state; or

(2) where the grounds of the action involve an act of state." (Italics ours.)

The rendition of a judgment upon any claim which, in its original nature, was a penal or revenue claim does not so change the nature of the obligation that courts otherwise incompetent to entertain jurisdiction of such claims are thereby rendered competent.

Wisconsin v. *Pelican Ins. Co.* (1888), 127 U. S. 265, 32 L. ed. 239, 8 S. Ct. 1370.
Huntington v. *Attrill* (1892), 146 U. S. 657, 36 L. ed. 1123, 13 S. Ct. 224.
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Arkansas v. *Bowen* (1894), 3 App. Cases D. C. 537, Aff'g. 20 D. C. Reps. 291.
Beale (1935), The Conflict of Laws, Sec. 443.1.
American Law Institute (1934), Restatement of The Law of Conflict of Laws, Secs. 443, 444.
Gibb, International Law of Jurisdiction (1926), p. 253.
Piggott "Foreign Judgments and Jurisdiction" (1908), Vol. I, at p. 92.
Dicey's Conflict of Laws, 5th ed., pp. 212-214.

On the settled principles of public and international law, in the absence of specific constitutional or statutory authorization, courts have no jurisdiction for the enforcement, either directly or indirectly, of a political law, for the reason that the exercise of the political power is a function not properly belonging to the judiciary. As stated by Mr. Justice Thompson, even though dissenting from this court's refusal to entertain jurisdiction in *Cherokee Nation* v. *Georgia* (1831), 5 Pet. 1, 75, 8 L. ed. 25, 75:

> "I, certainly, as before observed, do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties, most certainly do not belong to the judiciary. *It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.*" (Italics ours.)

See also:

Kentucky v. *Dennison* (1860), 24 How. 66, 108, 110, 16 L. ed. 717, 729, 730.

Georgia v. *Stanton* (1867), 6 Wall. 50, 77, 18 L. ed. 721, 725.

New Hampshire v. *Louisiana* (1882) and *New York* v. *Louisiana* (1882), 108 U. S. 76, 27 L. ed. 68, 2 S. Ct. 176.

Likewise, on settled principles of public and international law, in the absence of such specific constitutional or statutory authorization, courts have no jurisdiction to entertain an action for the extrastate enforcement of foreign revenue or penal laws, though the reasons therefor have not been so frequently and clearly enunciated. In denying such jurisdiction in respect to penal laws, courts have almost without exception seemingly deemed it sufficient to refer only to Mr.

Chief Justice Marshall's statement in *The Antelope*, 10 Wheat. 66, 123, 6 L. ed. 268, 282, that:

> "The courts of no country execute the penal laws of another."

A very similar and almost as often quoted remark of Lord Mansfield in *Holman* v. *Johnson* (1775), 1 Cowp. 341, 343, 98 Eng. Reps. (Full Reprint) 1120, 1121, namely:

> "For no country ever takes notice of the revenue laws of another."

has sufficed as a basis without a full statement of the real and underlying reasons, for many subsequent decisions denying extrastate enforcement to foreign revenue laws.

In *Moore* v. *Mitchell* (1929), 30 Fed. 2d. 600, 604 (Aff'd. on another ground, 1929, 281 U. S. 18, 74 L. ed. 673, 50 S. Ct. 175), L. Hand, circuit judge, in his opinion, elaborated on the reasons underlying the rule. His statements are, so far as appellee can ascertain, the only judicial discussion of any of the principles involved. Appellee therefore respectfully indulges in a quotation of some length from that opinion:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should

be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

In Beale (1935) "The Conflict of Laws," at page 1638, the author in discussing the problem of extrastate enforcement of foreign revenue laws, comments as follows upon the quoted excerpt from the opinion of L. Hand, circuit judge:

"It is undoubtedly true that in many instances the courts have repeated the rule without careful consideration, and merely as a literally corollary to the proposition that no state will enforce the penal laws of another state. Nevertheless, it is not difficult to find fundamental considerations which seem to furnish ample justification for the refusal to allow the action. As Judge L. Hand pointed out, the relation between a foreign state and its citizens is properly no concern of the forum. Furthermore, since the interest of the foreign state is directly affected, the interstate relation should be determined not by the court, but by the respective sovereign powers."

In Dicey's Conflict of Laws, 5th ed., at p. 214, the author, under "Comment," says:

"*Revenue Laws:* While refusal to enforce penal laws is easily understood, it is at first sight more difficult to justify the refusal of English Courts to enforce the revenue laws of foreign states. ***Not only can no action be brought to recover a revenue demand of a foreign government, whether in a judgment or not,*** but statutory authority exists under which negotiable instruments which are not duly stamped according to the law

of their place of issue are nevertheless held valid in England. The ground of this refusal to exercise jurisdiction may have been in some degree commercial convenience, and it may then be compared with the rule that contracts in England will not be held invalid merely because they aim at the contravention of foreign revenue laws, a doctrine which appears still to be part of the law of England. *The refusal may, however, be justified on ground of public policy. Revenue legislation by foreign states might be definitely injurious to British interests,* or it might be aimed at foreigners under circumstances, *e. g.*, in the case of political refugees, in which enforcement in England would be held to be contrary to public policy. *Inasmuch as the application of this principle and consequent differentiation between foreign revenue demands might prove a source of political embarrassment, the Courts, in refusing as a matter of principle, to enforce any revenue legislation, may be deemed to be observing a doctrine of public importance.* The Court of Appeals of New York has referred to the 'well settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such. The rule is universally recognized that the revenue laws of one state have no force in another.' *State of Colorado* v. *Harbeck* (1921), 232 N. Y. 71, 133 N. E. 357." (Italics ours.)

As will be readily noted, courts and writers, where more than a perfunctory reason is given for the non-enforcement extraterritorially of foreign penal and revenue laws, assign as a reason the lack of concern of the state of the forum with the governmental interests of the foreign state. It is earnestly and respectfully submitted that, as suggested by Dicey's Conflict of Laws, 5th ed., p. 214, a more vital and compelling reason for the incompetency of courts to entertain actions for the enforcement of the revenue laws of another state is the consequent threat to the very existence and well being of the state of the forum, and hence, is a mat-

ter properly and only cognizable by a branch of the state government other than the judicial. That this is true becomes apparent upon examination of the nature and extent of a state's power to tax, and the guaranties against the oppressive use of that power.

The profuse citation of authorities is unnecessary in submitting to this court that, except in so far as the States of the United States are limited by the Constitution of the United States, they are, in relation to the power of taxation, independent sovereigns. As stated in *Lane County* v. *Oregon* (1868), 7 Wall. 71, 77, 19 L. ed. 101, 105, by Mr. Chief Justice Chase, in discussing the effect of the Constitution upon the sovereign powers of the State in reference to taxation:

> "In respect, however, to property, business and persons, within their respective limits, their (the States') power of taxation remain and remains entire."

Moreover, the power to tax is measured only by the needs of the government and the property within its jurisdiction. In respect to the extent of the power and the guaranties against its oppressive use, Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland* (1819), 7 Wheat. 316, 428-431, 4 L. ed. 579, 607, said:

> "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. * * * That the power to tax involves the power to destroy; * * * are propositions not to be denied."

It is likewise clear that the remedy for oppressive taxation does not lie with the judicial branch of the government, *Springer* v. *United States* (1880), 102 U. S. 586, 594, 26 L. ed. 253, 256; that the Legislature of any State may adopt such means and methods, judicial or otherwise, for the collection of its revenue as it deems expedient and advisable so long as there is no violation of the constitutional guaranty of due process of law, *Kelly* v. *Pittsburgh* (1881), 104 U. S. 78, 26 L. ed. 658; *Ballard* v. *Hunter* (1906), 204 U. S. 241, 255-258, 51 L. ed. 461, 472, 27 S. Ct. 261; and that except in so far as a government has subjected itself to the judgment of its courts in the collection of its revenue, the judiciary is without power or authority to affect that collection in the absence of an abuse of constitutional power. In *Cheatham* v. *Norvekl* (1875), 92 U. S. 85, 88-89, 23 L. ed. 561, 563, Mr. Justice Miller says:

> "It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.
>
> "If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary."

And even to a greater extent does this apply to a State's subjecting itself to the control of Federal judiciary in respect to the collection of its taxes. See *Heine* v. *The Board of Levee Commissioners* (1873), 19 Wall. 655, 661, 22 L. ed. 223, 226, where Mr. Justice Miller said:

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the

> Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by a special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequence no less out of the way of judicial procedure, the end of which no wisdom can foresee."

In addition, there is no constitutional prohibition against either multiple taxation—

> *Davidson* v. *New Orleans* (1877), 96 U. S. 97, 24 L. ed. 616.
>
> *Coe* v. *Errol* (1885), 116 U. S. 517, 524, 29 L. ed. 715, 718, 6 S. Ct. 475.

or, too clear for the citation of authority, the imposition of a retroactive tax.

And, finally, taxes are not debts in the sense that they are liabilities arising out of contract, express or implied; taxes are enforced proportionate contributions to the State, levied by the authority of that State for all public needs, owe their existence to an exercise of the legislative power, and do not depend for their validity and enforcement upon the assent of the taxpayer. In *Meriwether* v. *Garrett* (1880), 12 Otto. 472, 513, 26 L. ed. 196, 205, Mr. Justice Field said:

> "Taxes are not debts. It was so held by this court in the case of *Lane Co.* v. *Oregon*, reported in 7th Wall. 71. Debts are obligations for the payment of money

> founded upon contract, express or implied. Taxes are impositions levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate in invitum. Nor is their nature affected by the fact that in some States, and, we believe, in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character."

See also:

Bristol v. *Washington County* (1899), 177 U. S. 132, 145, 44 L. ed. 701, 707, 20 S. Ct. 585.

It is apparent from this summary of the nature, extent and exercise of the power to tax that it is a vital and jealously guarded attribute of sovereignty, the control of which is not delegated to the judicial branch of the government, and that the enforcement of revenue laws is solely in the furtherance of the governmental, and not the proprietary, interests of the State. Moreover, and of controlling importance here, it also appears from this summary that the collection of taxes is a matter primarily of a political nature, and so vital to the sovereign interests of a State as to be outside the proper scope of judicial cognizance, power and interference, unless, and then only in so far as and to the extent that, a State, through the legislative branch of its government, specifically subjects itself thereto. In brief, the continued existence and well-being of any State or nation is dependent upon the maintenance of its revenues. Therefore, so far as may be, it is to the paramount interests of each State and its citizens, to the exclusion of all others, to maintain unimpaired its own ability to raise revenue. To the extent that other States enter and collect revenue for their own exclusive and governmental purposes, that ability is impaired. The measure of this impairment,

where the levies are constitutional, is the fiscal needs and extrastate collections of the foreign State, over which the State of the forum and its citizens have no control except in so far as they may prevent or limit collections within their own State by the foreign State. It is neither in accord with the settled principles of public and international law, nor with reason, to assume that a State which does not subject itself to the control of its courts in the collection of its own revenue would *unconditionally* subject itself to the control of its courts in the collection of the revenue of a foreign State. The absence of any limitations in the Constitution of the United States against multiple taxation, the imposition of retroactive taxes and oppressive and confiscatory taxes, otherwise constitutionally levied and assessed, permits as between the several States of the United States questions to arise in relation to extrastate enforcement of revenue laws which are questions only of State and public policy, and therefore, upon familiar principles, determinable solely by a branch of the government other than the judicial.

In addition to the cases heretofore cited, which recognize the nonjudicial nature and the consequent incompetency of courts to take cognizance of this question where no enabling, definitive, or limiting legislation provides therefor, in further recognition of these same principles, several States of the United States have enacted reciprocity statutes in respect to the extrastate collection of inheritance taxes; foreign countries have successfully negotiated more than a dozen bilateral conventions providing for mutual administrative assistance in tax collection matters, and the League of Nations has drafted a model treaty with respect to extrastate tax collections. In addition, students of the subject have suggested a number of alleged feasible means of meeting this problem, such as reciprocal legislation, an

Act of Congress, or interstate compacts under the "compact clause" of the Constitution of the United States.

See Note: 48 Harvard Law Rev. 828.

It should be observed that the means and methods adopted and suggested looking toward a solution of this problem recognize the paramount interest of a State in maintaining unimpaired its own ability to raise revenue, and in recognition of this primary interest of each State, do not require or propose that a State shall give extraterritorial effect to foreign revenue demands, confiscatory in operation, or contrary to its own public policy.

It is respectfully asserted that no one could reasonably contend that a State's interest in assisting a sister State in the collection of its revenue is, or should be, subordinate to its interest in maintaining its own revenue for its own governmental purposes. Unless and until adequate protection is given the State's primary interest in the maintenance of its own revenue, no State should be compelled to assist any other State in the furtherance of that State's governmental interests through extrastate enforcement of the latter's revenue laws. Adequate protection demands, for example, reciprocity, priority of right and lien in respect to the collection of its own revenue claims within its territorial jurisdiction, and conditions effectively excepting from the duty of extrastate enforcement such foreign revenue demands as it shall deem confiscatory in operation, or subversive of its own interests, or the interests of its citizens. Appellee submits that as clear as the necessity for these safeguards is, it is no less clear that their erection is not a matter for the judiciary. By the very nature of the interest to be protected and the provisions necessary for that protection it is submitted that legislative action is re-

quired, first, to determine what safeguards shall be deemed adequate; and, second, to erect those safeguards.

Appellant, on page 30 of its brief, has urged on this court the obsolescence of the principle against the extrastate enforcement of revenue legislation and its inapplicability, in the United States, because the "United States is all one country and the rules applicable to international relations ought not to apply." Apart from ignoring the dual sovereignties set up by the Constitution of the United States, appellant seemingly ignores the functional consequences which would arise out of a recognition of the several sovereignties for the purpose of the levy and assessment of taxes, and a nonrecognition of these several sovereignties for the purpose of the collection of taxes. It would be difficult to imagine a situation more chaotic as between the several States of the United States than where there was a complete decentralization in the levy of a tax, but centralization without coordination and integration in the collection of a tax. Within the United States at the present time, the problem of coordination and integration of Federal, State and local tax systems has become a most vexatious problem: James K. Hall, in "The Coordination and Integration of Federal, State and Local Tax Systems," 10 Washington Law Review, 22-24, presents the problem and the present chaotic condition in as brief a form as its complexity will permit. The need for cooperation, coordination and integration of the countless number of taxing units throughout the United States is very real, but it cannot be successfully accomplished through judicial action, and certainly not by means of obliterating State sovereignties for the purpose alone of *collecting* taxes.

Appellant states, on page 26 of its brief, that it submits its case to this court on the reasoning of the New Jersey

court in *People* v. *Coe Mfg. Co.* (1932), 10 N. J. Misc. 1161, 162 Atl. 872, Aff'd. (1934), 172 Atl. 198. Inasmuch as appellant in its brief has quoted both from the opinion of the intermediate court and the opinion of the court of last resort in that case, and which opinions do not decide the case on the same ground, it is impossible to ascertain appellant's position. If appellant relies on the reasoning in the opinion of the intermediate court, it is, in effect, asking this court to reverse both *Wisconsin* v. *Pelican Ins. Co.* (1887), 127 U. S. 265, 32 L. ed. 239, 8 S. Ct. 1370, and *Huntington* v. *Attrill* (1892), 146 U. S. 657, 36 L. ed. 1123, 13 S. Ct. 224, because those cases clearly hold, and they have many times since been approved, that the "full faith and credit" clause of the Constitution of the United States does not preclude an inquiry into the original nature of the claim for the purpose of determining whether or not the claim is of such nature that the court is authorized to enforce it. In so far as appellant may rely upon the reasoning of the New Jersey Court of Errors and Appeals in 172 Atl. 198, it must necessarily contend that the original tax which it is seeking to collect was contractual in its inception. At the outset it is apparent from the nature of the tax involved in the *Coe* case, namely a franchise tax, and the nature of the tax here involved, namely an income tax, that there is no similarity. A franchise tax is, in essence, a license, and only as such does it fall within the American Law Institute's Restatement of the Law of Conflict of Laws (1934), Sec. 443, subsec. d. Appellant, however, on page 26 of its brief, no doubt in reliance upon Section 226.02 (h) of the Statutes of Wisconsin, set out on page 6 of its brief, argues that appellant here "pledged itself • • • to pay the Wisconsin income tax." Suffice it to say that neither the provision of the Wisconsin statute quoted nor any other of the asserted im-

port was in effect at the time of the accrual of the tax liability in question.

However, as has been pointed out above, a tax liability is not, expressly or by implication, contractual in its nature. The case for extrastate enforcement of tax liabilities is as ably presented as the nature of the problem permits by Robert A. Leflar, "Extrastate Enforcement of Penal and Governmental Claims" in 46 Harvard Law Review 193, relied upon and cited on page 27 of appellant's brief. This strong proponent for the extrastate collection of taxes, on pages 220-221, says, in respect to predicating extrastate enforcement on the contractual nature of any given tax liability:

> "Recognition of this urgent need for extrastate enforcement of tax liability has produced a contention that some varieties of taxes, notably the inheritance tax, are contractual, or at least so based upon the consent of the taxpayer as not to be compulsory, and therefore not penal in nature. This argument is a technical one, to the effect that certain privileges such as that of taking the property is a decedent by will or descent are creatures of the law and can be conditional as the law pleases, so that one who accepts such a privilege from the law must assent to all the conditions, including the payment of taxes, which the governing law has chosen to impose. The same argument could of course be applied to corporate franchise taxes or to any other tax levied in return for a privilege conferred by the state. It probably could not be applied to income taxes or to property taxes generally, though ingenuity might well carry it as far as the limits, if any, of the conception that the rights and privileges of men are all creatures of the law. Needless to say, that is not an accurate analysis of the nature of the obligation to pay taxes. It is an analysis conjured up to fit the supposed needs of an occasion. Besides, it does not meet the problem. The trouble lies deeper. The need is for extrastate enforcement of all legitimate tax liabilities, not merely some of them. The reasons for such enforce-

ment have nothing to do with the allegedly consensual nature of the liability, and the reasons against enforcement apply equally to the taxes which can be called consensual and to those which cannot. The point is simply irrelevant."

Upon authority, and upon reason, it is respectfully submitted that due regard for the independent sovereignty of the several States of the United States, and of the peculiarly vital interest of each of these States in the determination of this problem of extrastate enforcement of revenue laws, should make this court extremely hesistant to extend the jurisdiction of the District Courts of the United States to controversies of this nature which, under the settled rules of public and international law, are not within the proper scope of judicial cognizance. See:

Healy v. *Ratta* (1934), 292 U. S. 263, 271, 78 L. ed. 1248, 1254, 54 S. Ct. 700, 703.

Mathews v. *Rogers* (1931), 284 U. S. 521, 525, 76 L. ed. 447, 452, 52 S. Ct. 217.

Finney v. *Guy* (1902), 189 U. S. 335, 346, 47 L. ed. 839, 845, 23 S. Ct. 558.

Warren, Federal and State Court Interference, 43 Harv. Law Rev. 346, 378.

B. *An action to enforce, either directly or indirectly, a penal law for the protection of the revenue, or the revenue law, of a foreign State is not an action "of a civil nature" within the meaning of Section 24 of the Judicial Code of the United States (28 U. S. C. A., Sec. 41).*

The jurisdiction of district courts of the United States is statutory, and therefore definitely limited. Section 24 of the Judicial Code, 28 U. S. C. A., Sec. 41, provides:

"ORIGINAL JURISDICTION: The District Courts shall have original jurisdiction as follows:

> (1) United States as plaintiff; civil suits at common law or in equity. First: Of all suits of a *civil nature*, at common law or in equity, brought by the United States, or any officer thereof, authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or valueof $3,000.00, and (a) arises under the Constitution of laws of the United States, or treaties made, or which shall be made under their authority, or (b) as between citizens of different states, or (c) as between citizens of a state and foreign states, citizens or subjects * * *." (Italics ours.)

For jurisdictional purposes, the nature of an original cause of action is not so changed by the rendition of a judgment upon it that courts incompetent to entertain the original action are rendered competent by the rendition of a judgment upon such action. Causes of action not "of a civil nature" do not become such upon the rendition of judgment. In *Wisconsin* v. *Pelican Insurance Co.* (1888), 127 U. S. 265, 293, 32 L. ed. 239, 244, Mr. Justice Gray says:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

See also:

American Law Institute, Restatement of the Law of Conflict of Laws, Secs. 443, 444.

Piggott, Foreign Judgments and Jurisdiction (1908), Vol. 1, at page 92.

Dicey's Conflict of Laws, 5th ed., p. 212.

The jurisdiction conferred upon District Courts of the United States of certain actions "of a civil nature" refers to the nature of the action, and not to its form.

Wisconsin v. *Pelican Ins. Co.* (1888), 127 U. S. 265, 293, 32 L. ed. 239, 244.

Ames, et al. v. *Kansas*, and *Kansas Pacific Ry. Co.* v. *Kansas* (1883), 111 U. S. 449, 28 L. ed. 482.

State of Indiana v. *Allegheny Oil Co., et al.* (1898), 85 Fed. 870.

The intent and meaning of the words "suits of a civil nature" seems to appellee to be well stated in the case of *Indiana* v. *Allegheny Oil Co., supra,* by District Judge Baker, at page 873:

> "And, if this were not so, still the suit must be held not to be within the jurisdiction of this court, because, although a civil action in form, it is in effect a suit to enforce a penal statute of the state. The contention that the action is civil, and not penal, in its nature, because the statute of the state declares it to be a civil action, is untenable. If Congress had intended that the form of the action should determine the right of removal, apt language would have been used to indicate that purpose. The language employed is "suits of a civil nature." If the form, rather than the nature, of the action had been intended to determine the right of removal, Congress would undoubtedly have used the words "suits civil in form," or perhaps the more general expression "civil suits," instead of using the language employed. In using the language "suits of a civil nature" it discloses the intent that the court should look beyond the form to the nature or purpose of the suit."

1. An action to enforce, either directly or indirectly, a penal law for the protection of the revenues of a foreign State is not an action "of a civil nature."

It affirmatively appears from the transcript of the judgment appellant is seeking to enforce that the judgment is based in part upon a pecuniary penalty for the violation of the statutes of the State of Wisconsin for the protection of its revenue. (Cert. 9, 10.)

In *Wisconsin* v. *Pelican Ins. Co.* (1888), 127 U. S. 265, 290-291, 32 L. ed. 239, 244, 8 S. Ct. 137, an action was brought by the State of Wisconsin against Pelican Insurance Company, a foreign corporation, as an original action in the Supreme Court of the United States upon a judgment rendered by a Wisconsin court for penalties imposed by a statute of Wisconsin for the defendant's failue to make a return in respect to its business and property to the insurance commissioner of the State of Wisconsin, as required by that statute. The defendant demurred on the ground that the action was not an action of a "civil nature" within the original jurisdiction of the Supreme Court of the United States. The demurrer was sustained and judgment entered for the defendant on the demurrer. Mr. Justice Gray says, 32 L. ed. 239, 244:

> "The rule that the courts of no country can execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery *of pecuniary penalties for any violation of statutes for the protection of its revenue*, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Whart. Confl. L., Sec. 833; Westlake, Internat. L., 1st ed., Sec. 388; Piggott, Foreign Judg., 209, 210." (Italics ours.)

Mr. Justice Gray then, after a discussion of the limitation of its original jurisdiction to action of a "civil nature," found that, irrespective of the judgment entered on the

claim, the action was not an action of a "civil nature," and not within the original jurisdiction of the Supreme Court of the United States.

It may be argued that because a portion only of the judgment which was secured by Milwaukee County was for a penalty, that the decision of the Supreme Court of the United States in the case of *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 471, 32 L. ed. 239, is not applicable. That position, however, is not at all tenable. The judgment must be considered in its entirety.

An action, though only in part for the collection of a penalty, is an action on a penal claim, and, though reduced to judgment, is nevertheless still of a penal nature.

In the case of *State of Arkansas* v. *Bowen*, 3 App. Cases D. C. 537, the defendant and appellee, Bowen, had executed as surety the official bond of one Turner, a collector of revenue for one of the counties (a political subdivision) of the State of Arkansas. For an alleged default on the part of Turner, the collector of revenue, the defendant and appellee, Bowen, was sued on the official bond and judgment was entered against him for the amount of the defalcation, and in addition a penalty of twenty-five per centum imposed by law. Suit was instituted upon this judgment against the defendant and appellee in the District Court for the District of Columbia. In the trial court, judgment was entered for the plaintiff which, on appeal, was reversed (20 Dist. of Colum. Reps. 291), and on appeal to the Court of Appeals of the District of Columbia the reversal was affirmed on the ground that the District Court had no jurisdiction of an action to enforce a foreign penal law. The court said (3 App. Cases, Dist. of Colum. 537), 545:

> "But while to some extent it is sought here to recover the money due to the county and unlawfully retained

> by the collector, the judgment is not confined to that. It embraces a penalty as well, and a double penalty; and we cannot in this action separate the claim for the penalty from the claim for money had and received. While the record shows how much was penalty and how much was money actually retained, yet the judgment is one and indivisible, and we could not apportion the recovery."

It will be noted that in the case last cited, the original cause of action, apart from the penalty, was of such nature as unquestionably to be enforceable in an ordinary common law action because of its contractual nature. Nevertheless, the court held that since the judgment included, in part, a pecuniary penalty, and since a judgment is indivisible, it must be denied extraterrritorial enforcement on the principles announced in the *Pelican* case.

2. An action to enforce, either directly or indirectly, a revenue law of a foreign State is not an action "of a civil nature."

Appellant on page 7 of its brief states that "civil" is intended to refer to all matters not criminal. This statement as submitted is altogether too broad in its generality. In

1 Bouvier Law Dictionary, page 329

"civil action" is defined as:

> "an action which has for its object the recovery of private or civil rights in compensation for their infraction."

and in

Andrews Law Dictionary, page 185

"civil" is defined as:

> "concerning the rights of and wrongs to individuals considered as private persons, in contradistinction to criminal, or that which concerns the whole political society."

The collection of taxes is a peculiar proceeding and need not and is not ordinarily effected through judicial means. When an action for the collection of taxes is brought in a court of law it is to vindicate neither private nor proprietary rights, but rights of sovereignty and concerns the whole political society. It is submitted, therefore, that this action is not a suit "of a civil nature."

Appellee respectfully asserts that upon the settled principles of public and international law established by the above mentioned authorities, the District Court of the United States has no jurisdiction to entertain this action unless Article IV, Section 1 of the United States Constitution, as contended by appellant on page 14 of its brief, confers jurisdiction.

II.

Article IV, Section 1 of the Constitution of the United States, and the Act of May 26, 1790, Chap. 11 (28 U. S. C. A. 678) do not compel the courts within the United States to entertain jurisdiction of an action, either directly or indirectly, for the extrastate enforcement of the revenue laws of one of the States of the United States.

Article IV, Section 1, United States Constitution, provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Act of May 26, 1790, Ch. 11 (28 U. S. C. A. No. 687), provides for the proper authentication of a judgment of a

sister state and further states that all such authenticated judgments

> "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the court of the state from which they are taken."

A. *The framers of the Constitution of the United States did not, by Article IV, Sec. 1 of that Constitution, intend to increase or extend the jurisdiction of the courts of the several states of the United States.*

In Story's Commentaries of the Constitution of the United States (1833), Vol. 3, it is stated at page 176:

> "The general rule of the common law recognized both in England and America, is that foreign judgments are prima facie evidence of the rights and matter, which they purport to decide."

and at page 178:

> "The framers of both instruments (The Articles of Confederation and the Constitution of the United States) must be presumed to have known that by the general rules of comity between nations, and the long established rules of the common law, both in England and in America, foreign judgments were prima facie evidence of their correctness."

and at page 180:

> "They (the framers of the Constitution) intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the states, such as belonged to those foreign nations and tribunals; but to give them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot contradict it, or the truth of them be denied, any more than in the State where they originated."

Bearing in mind, therefore, the intent of the framers of the Constitution to provide a "more perfect Union" without

destroying the sovereignty of the States of which that Union was to be composed, the weight and effect as evidence given foreign judgments at the time of the framing of that instrument, and the language used in the Constitution itself amply support Mr. Story's interpretation of the intent of the framers when he says the framers of the Constitution "intended to give * * * to the judicial proceedings of each of the States * * * full faith and credit; *that is, to attribute to them positive and aboslute verity,* * * *." (Italics ours.) It would appear that the framers of the Constitution had intended to lay down a rule of evidence, and not of jurisdiction.

B. *Article IV, Sec.* 1 *of the Constitution of the United States, and the Act of May* 26, 1790, *Chap.* 11 (28 *U. S. C. A. Sec.* 687) *have, by this court, been interpreted as not increasing or extending the jurisdiction of the courts within the United States.*

This court has, on occasions too numerous to mention, said that the "full faith and credit" clause of the Constitution established a rule of evidence rather than of jurisdiction.

Anglo American Provision Co. v. *Davis Provision Co.*, 191 U. S. 373, 374, 48 L. ed. 225, 227,

where Mr. Justice Holmes said:

> "The precise point has not been decided by this Court, but it has been laid down in cases which raise greater difficulties than the present, that this provision of the Constitution establishes a rule of evidence rather than of jurisdiction."

And in *Huntington* v. *Attrill* (1893), 146 U. S. 657, 685, 36 L. ed. 1123, 1134, Mr. Justice Gray said, in reference to this provision of the Constitution and the supplementary legislation pertaining thereto:

> "These provisions of the Constitution and the laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow • • • and they confer no new jurisdiction on the courts of any state; and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other state than that in which the penalty was incurred."

This constitutional provision and the supplementary legislation in reference thereto has been similarly interpreted in respect to the jurisdiction of the courts of the United States.

Wisconsin v. *Pelican Ins. Co.* (1887), 127 U. S. 265, 32 L. ed. 239.

C. *"Full faith and credit" under Article IV, Sec. 1 of the Constitution of the United States, and the Act of May 26, 1790, Chap. 11 (28 U. S. C. A. Sec. 687), does not compel courts to assume jurisdiction of actions concerning which they are otherwise incompetent.*

This court, in *Huntington* v. *Attrill* (1893), 146 U. S. 657, 36 L. ed. 1123, by negative implication held that a judgment based upon a foreign penal law was not, under the "full faith and credit clause," entitled to the benefit of the mandatory provision of the Constitution and supplementary legislation to "full faith and credit." In *Anglo American Provision Co.* v. *Davis Provision Co.* (1903), 191 U. S. 373, 374-76, 48 L. ed. 225, 227, it was held that "full faith and credit" was not denied an Illinois judgment by the New York Code of Civil Procedure, Sec. 1780, which, as construed, precluded the maintenance of an action on such judgment by one foreign corporation against another. Mr. Justice Holmes, after first observing that the "full faith and credit" clause was a rule of evidence rather than a rule of jurisdiction, said:

"The Constitution does not require the State of New York to give jurisdiction to the Supreme Court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the Act in pursuance of it which Congress has passed * * * but the Constitution does not require the State to provide such a court * * *. If the State does provide a court to which its own citizens may resort in a certain class of cases, it may be that citizens of other states of the Union also would have a right to resort to it in cases of the same class * * *, but that right, even when the suit was upon a judgment of another state, would not rest on the first section of Article IV, on which alone the plaintiff relies or can rely, but would depend on the second section, entitling the citizens of each State to all privileges and immunities of citizens in the several states. The plaintiff is not a citizen within this section * * * and did not set it up."

The mandatory force of the "full faith and credit" clause, as supplemented by the legislation of Congress, has not as yet been fully defined, expanded and limited by this court, particularly in respect to its relation to the "privileges and immunities" clause of the Constitution. In two comparatively recent cases, namely, *Broderick* v. *Rosner* (1934), 79 L. ed. advance opinions 619, 623, and *McKnett* v. *St. Louis & S. F. Ry. Co.* (1933), 292 U. S. 230, 233, 78 L. ed. 1227, 1229, 54 S. Ct. 690, this court has had occasion to review past decisions of this court in respect to the extent of the mandatory force of Article IV, Section 1 of the Constitution, and the Act of May 26, 1790, Chap. 11 (28 U. S. C. A., Sec. 687). In substance, this review concludes that under the existing decisions of this court, the "full faith and credit" clause in some instances requires a State court to take jurisdiction of an action to enforce a judgment recovered in another State, although it might have refused to entertain a suit on the original action as

obnoxious to its public policy, but that, though the constitutional limitations imposed by the "full faith and credit" clause abolished in large measure the general principles of public and international law by which local policy is permitted to dominate rules of comity, there is no compulsion upon the States to provide courts with a jurisdiction which they do not have under settled principles of public and international law. It is axiomatic, of course, that the mandatory force of the "full faith and credit" clause is no greater in respect to the courts of the United States than in respect to the courts of the several States. Though in these opinions it is stated or indicated that the room left by the "full faith and credit" clause for the play of conflicting policies of the several States is a narrow one, it is respectfully suggested that where, as here, the determination turns not solely upon comity but primarily upon the competency or authority of courts the mandatory force of the "full faith and credit" clause does not become operative, and therefore no question of falling within the room left for permissive play of conflicting policies of the several States arises.

In addition to the authorities heretofore cited, see also:

American Law Institute (1934), Re-Statement of the Law of Conflict of Laws, Sec. 443-d.

This seems the more clear since appellant derives no benefit from the "privileges and immunities" clause of the Constitution.

Conclusion.

Before stating its conclusion, appellee feels it to be its duty to call to this Court's attention one question which by reason of the narrow scope of the certificate of the United States Circuit Court of Appeals for the Seventh Circuit is perhaps excluded from the points which might properly be presented to this Court in this proceeding. However, as it does appear in the certificate that appellant invokes the jurisdiction of the District Court on the ground of diversity of citizenship, appellee hesitantly suggests to this Court that it consider whether or not the requisite diversity of citizenship exists.

Milwaukee County is a political subdivision of the State of Wisconsin, and in collecting income taxes levied and assessed under the law of the State of Wisconsin is an agent and instrumentality of that State in so far as it collects for the State itself the State's portion of such income tax. *In re State, et al.,* 1932 (Wisc.), 245 N. W. 844, 847. This Court has recently decided in *State Highway Commission of Wyoming* v. *Utah Construction Company,* 1928, 278 U. S. 194, 73 Law Ed. 262, 49 S. Ct. 104, that the requisite diversity of citizenship for invoking the jurisdiction of the District Courts of the United States does not exist in controversies between a state agency and a citizen of another state.

We beg the Court, therefore, in its consideration of the question certified to accept as properly presented to this Court on the record the question whether or not the requisite diversity of citizenship exists to confer upon the District Court of the United States jurisdiction of this cause irrespective of the other questions involved and raised in this brief.

Appellee respectfully submits that the District Court of the United States in and for the State of Illinois, though having jurisdiction of the parties, should *not* entertain jurisdiction of an action therein brought based upon a valid judgment for over $3000 rendered by a court of competent jurisdiction in the State of Wisconsin against the same defendant, which judgment was predicated upon income tax due from the defendant to the State of Wisconsin, because (1) the District Court of the United States States for the Northern District of Illinois is without jurisdiction to entertain such an action, and (2) the "full faith and credit" clause of the Constitution of the United States and the Act of Congress, supplemental thereto, do not compel courts within the United States to entertain jurisdiction of such an action; and therefore that the question certified to this court by the Judges of the United States Circuit Court of Appeals for the Seventh Circuit should be answered in the negative.

Respectfully submitted,

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